Supreme Court, U.S.
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No. 95-1832

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SOON Y. PARK,

Petitioner,

v.

HOWARD UNIVERSITY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should exercise its certiorari jurisdiction to review the application of settled law concerning exhaustion of administrative remedies to bar a Title VII hostile work environment claim when the employee's EEOC charge did not allege a hostile environment but challenged only a single decision by her employer not to appoint her to a position she desired.

RULE 29.6 STATEMENT

Respondent Howard University has no parent companies and no nonwholly owned subsidiaries.

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BRIEF IN OPPOSITION

Respondent Howard University respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit.

COUNTERSTATEMENT

As originally framed, this case presented one issue: whether Howard University ("the University") discriminated against Soon Y. Park ("Park"), a tenured professor at the University, on the basis of her sex and national origin in violation of Title VII, 42 U.S.C. §§ 2000e to 2000e-17, by not selecting her to be Assistant Dean for Student Affairs at the University's

College of Pharmacy and Pharmacal Sciences ("the College of Pharmacy"). Although the district court, after a bench trial, rejected Park's claim, it entered judgment for her on a different theory that Park had neither presented in the charge she filed with the Equal Employment Opportunity Commission ("EEOC") nor pleaded in her original or amended complaint. The court of appeals properly determined that petitioner had failed to exhaust her administrative remedies and reversed the judgment.

Soon Y. Park, a Korean-American, is a tenured Associate Professor in the Department of Pharmacy Practice in the University's College of Pharmacy. She joined the faculty as an Assistant Professor in 1981, Pet. App. A18, and in 1987 she received tenure and was promoted to the rank of Associate Professor. *Id.* at A23. This dispute arose in 1992 when the Dean of the College selected Bertram Nicholas (a white American) to become Assistant Dean for Student Affairs in the College of Pharmacy, a position in which Park had expressed an interest. [1] *Id.* at A25.

Nicholas, as the district court ruled, was more qualified for the position than Park and was selected for the position because of these qualifications. *Id.* at A29-A30. Unlike Park, he held a doctorate in higher education administration. He also had prior experience as an Assistant Dean for Student Affairs at the Massachusetts College of Pharmacy, where he served six years as Chairman of the Department of Pharmacy. *Id.* at A25.

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[1] Under the College's Articles of Organization, assistant deans are appointed annually at the Dean's discretion after an informal selection process. Pet. App. A25; Trial Transcript 587. The positions are not full-time, but are assumed by full-time faculty members in addition to their other responsibilities for a small stipend. Thus, assistant dean assignments are restricted to current faculty members.

On September 23, 1992, Park filed a charge of discrimination with both the District of Columbia Department of Human Rights and Minority Business Development ("D.C. Department of Human Rights") and the EEOC alleging that the University discriminated against her on the basis of her sex and national origin in the selection of Nicholas as Assistant Dean for Student Affairs. *Id.* at A70-A73. Park alleged that the University, "on or about March 25, 1992 [the date she learned of Nicholas' selection] and continuing * * * subject[ed] me to differential treatment in terms and conditions of employment[] because of my sex (female) and national origin (Korean)." *Id.* at A70. The charge also stated generally that Park was "denied the opportunity for advancement in my career." *Id.* at A72. All of the particulars of her claim listed on the administrative charge related to the process by which Nicholas was selected to fill the assistant dean position. *Id.* at A71-A72.

On November 25, 1992, after the EEOC issued a Notice of Right to Sue, *id.* at A28-A29, Park filed her complaint in this case. D.C. Circuit Joint Appendix ("J.A.") 9. Like the administrative charge, the complaint alleged discrimination based on sex and national origin in the selection of Nicholas for the assistant deanship. *Id.* at 10-11. On December 11, 1992, Park filed an amended complaint, *id.* at 13, in which she further alleged an "atmosphere of sexual harassment" at the University. *Id.* at 15.

The district court granted the University's motion for partial summary judgment on Park's allegations of sexual harassment "on the grounds that the amended complaint contains no discrete claim of sexual harassment." Pet. App. A14. Following a four-day bench trial, the district judge to whom the case had been reassigned issued an opinion deciding liability issues. *Id.* at A16. He construed Park's amended complaint to allege three claims: (1) sexual harassment; (2)

discrimination on the basis of sex and national origin in the nonselection of Park as Assistant Dean for Student Affairs; and (3) "[a]n on-going pattern of discrimination against [Park] based on her sex *and* national origin which created a hostile work environment." *Id.* at A17 (emphasis in original). It was only at this time -- after trial -- that the University learned of the court's view that this case involved a national-origin hostile work environment claim. Even though Park's EEOC charge challenged only her nonselection as assistant dean, the court held, without any explanation or analysis, that Park had exhausted her administrative remedies with respect to all three of the claims that it believed were stated in her amended complaint. *Id.* at A28-A29.

The court ruled against Park on two of the three claims. The sexual harassment claim, it held, failed because it had already been dismissed. *Id.* at A29. The court also ruled against Park on her claim that the selection of Nicholas to be Assistant Dean for Student Affairs was discriminatory. It concluded that the University "had a legitimate and nondiscriminatory reason" for the decision: "Dr. Nicholas was better qualified than [Park] in terms of education and experience for the assistant deanship." *Id.* at A30. Park did not carry her ultimate burden of persuading the court that the University's "proffered reason was not the true reason for the employment decision and that she was intentionally discriminated against." *Id.* (citing *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502 (1993)).

With respect to the purported hostile work environment claim, the court did not find the existence of a hostile environment based on Park's sex. It did rule, however, that Park was subjected to national origin harassment at the University that created a hostile work environment, and awarded damages. [2]

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[2] In making a damages determination, the district court expressly considered conduct predating the November 21, 1991 effective date of the 1991 Civil Rights Act, J.A. 45-49, notwithstanding this

The court of appeals reversed in an opinion by Judge Sentelle, joined by Judge Wald and Judge Silberman. The court held that Park had "failed to exhaust her administrative remedies at the EEOC for the hostile work environment claim." Pet. App. A4. Citing decisions from the Fourth and Seventh Circuits, and adopting the very standard Park urged (Brief for Appellee 22), the court of appeals noted that a Title VII lawsuit is limited in scope to claims that are reasonably related to, and would reasonably be expected to grow out of, the plaintiff's EEOC charge. *Id.* at A4-A5. Park's administrative charge, however, "did not express or even hint at a national origin hostile work environment claim," *id.* at A5, and "lack[ed] any factual allegations supporting such a claim." *Id.* at A7. It made no reference to the various actions that the district court found to constitute a hostile work environment. *Id.* Rather, it focused exclusively on the specific decision involving the assistant dean position, *see id.* at A5-A7 (quoting EEOC charge) -- a decision the district court found was "legitimate and nondiscriminatory." *Id.* at A30. Accordingly, "[b]ecause Park's EEOC charge contained no claims or factual allegations that could reasonably be expected upon investigation to lead to a hostile work environment claim," the court held that "she failed to exhaust her administrative remedies for such a claim at the EEOC," and "[h]er civil claim for a hostile work environment is therefore barred." *Id.* at A8-A9. [3]

Court's holding in *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483 (1994), that Title VII plaintiffs cannot recover compensatory damages for conduct occurring before that date.

[3] The University also argued on appeal that the district court erred in holding the University liable for conduct occurring outside the statutory limitations period, in determining that the conduct of which Park complained constituted a hostile work environment, and in awarding damages based to a significant extent on conduct that occurred long before the effective date of the 1991 Civil Rights Act, in violation of principles described by this Court in *Landgraf*.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS DID NOT ADOPT A "NEW RULE" OF EXHAUSTION, BUT RATHER APPLIED THE SETTLED RULE TO THE FACTS OF THIS CASE

An EEOC charge is a prerequisite to a lawsuit under Title VII. 42 U.S.C. § 2000e-5(b), (e), (f); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). [4] The purpose of this exhaustion requirement is to give the employer notice of the conduct about which the employee is aggrieved and to afford the employer and the EEOC an opportunity to resolve the dispute. *Id.* at 44; *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 472 n.325 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

In determining whether a plaintiff has exhausted her administrative remedies, lower courts have uniformly held that a Title VII lawsuit is "limited by the charge filed with the EEOC and the investigation which can reasonably be expected to grow out of that charge." *Powers* v. *Grinnell Corp.*, 915 F.2d 34, 38 (1st Cir. 1990) (internal quotation marks omitted). [5] Thus, the universal rule is that Title VII claims are cognizable only if they are "'like or reasonably related to the allegations

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Because of its disposition of the case, the court of appeals did not consider these arguments, Pet. App. A9, which provide separate grounds for sustaining the court of appeals' judgment and therefore further counsel against granting review in this case.

[4] Title VII and the District of Columbia Human Rights Act require charges filed with, respectively, the EEOC and the D.C. Department of Human Rights to be served on the charged party. *See* 42 U.S.C. § 2000e-5(b); D.C. Code § 1-2545(a).

[5] *Accord, e.g.*, *Miller* v. *International Tel. & Tel. Corp.*, 755 F.2d 20, 23-24 (2d Cir.), *cert. denied*, 474 U.S. 851 (1985); *Chisolm* v. *United States Postal Serv.*, 665 F.2d 482, 491 (4th Cir. 1981); *Ostapowicz* v. *Johnson Bronze Co.*, 541 F.2d 394, 398-399 (3d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977). *See* Pet. 9 (citing cases).

of the [administrative] charge and grow[] out of such allegations.'" *Jenkins* v. *Blue Cross Mut. Hosp. Ins., Inc.*, 538 F.2d 164, 167 (7th Cir.) (in banc) (quoting *Danner* v. *Phillips Petroleum Co.*, 447 F.2d 159, 162 (5th Cir. 1971)), *cert. denied*, 429 U.S. 986 (1976). Petitioner in fact recognizes that the courts have been unanimous in applying these standards to exhaustion issues. Pet. 9-11. *See also* Brief for Appellee 22 ("We agree with appellant that the scope of a title VII lawsuit is 'limited by the charge filed with the EEOC and the investigation which can reasonably be expected to grow out of that charge'") (quoting Brief for Appellant 17).

These settled standards for determining the scope of the administrative charge for exhaustion purposes are *precisely* the standards applied by the court of appeals below. Quoting the Seventh Circuit's decision in *Cheek* v. *Western & Southern Life Ins. Co.*, 31 F.3d 497, 500 (7th Cir. 1994), the D.C. Circuit held that "[a] Title VII lawsuit following the EEOC charge is limited in scope to claims that are 'like or reasonably related to the allegations of the charge and growing out of such allegations.'" Pet. App. A4-A5. Quoting the Fourth Circuit's decision in *Chisolm*, the court of appeals held that "[a]t a minimum, the Title VII claims must arise from 'the administrative investigation that can reasonably be expected to follow the charge of discrimination.'" Pet. App. A5.

Applying these settled standards to the facts of this case, the court of appeals determined that Park had not exhausted her administrative remedies as to the claim of hostile work environment on which she had prevailed in the district court. As we explain more fully in Part II, the decision was plainly correct. More importantly for present purposes, it represents no more than the application of settled law to the facts of this case, as petitioner herself recognized below. *See* Brief for Appellee 22 ("What can 'reasonably be expected' [to grow out of the EEOC charge] necessarily turns on the

facts of the particular case"). The decision below therefore provides no occasion for the exercise of this Court's certiorari jurisdiction.

Petitioner charges that the court of appeals adopted a "new rule negating the well-founded rule heretofore followed in all circuits." Pet. 8. Not so. Certainly nothing on the face of the court's opinion supports the claim that the D.C. Circuit has suddenly departed from well-settled standards applicable to the exhaustion requirement. Petitioner recognizes as much when she observes that this "new rule" was "neither fully articulated nor rationalized by the Court below." *Id.* The reason for this "failure" is plain: the court of appeals -- relying expressly on the standards Park urged -- simply applied settled law to the facts of this case and therefore had no need to articulate or rationalize a "new rule."

Petitioner claims that "[o]ther courts of appeal reviewing district court determinations of exhaustion have been clear that the claim in district court need not have been pled, or evidence supporting it have been set out, in the preceding EEOC charge." Pet. 13. We agree. What these courts require, like the court below, is only that the claim must be set out in the EEOC charge *or* could reasonably be expected to grow out of the charge. *See, e.g.*, *Powers*, 915 F.2d at 38. The court of appeals did not require that the claim appear on the face of the administrative charge, but rather applied the more expansive inquiry to petitioner's claim. Pet. App. A4-A5, A8-A9. Petitioner's claim simply failed that test.

Petitioner's real complaint, therefore, is with the result of the court's application of undisputed principles of law. That factbound complaint, however, provides no "compelling" issue requiring this Court's review. S. Ct. Rule 10. In any event, as explained more fully below, the court of appeals was correct in its determination that petitioner had failed to preserve a national origin hostile work environment claim.

II. THE DECISION BELOW WAS CORRECT

"The requirement of some specificity in a charge is not a 'mere technicality.'" *Rush* v. *McDonald's Corp.*, 966 F.2d 1104, 1111 (7th Cir. 1992). That is because allowing a lawsuit "to encompass allegations outside the ambit of the predicate EEOC charge would circumvent the EEOC's investigatory and conciliatory role as well as deprive the charged party of notice of the charge, as surely as would an initial failure to file a timely EEOC charge." *Babrocky* v. *Jewel Food Co. & Retail Meatcutters Union, Local 320*, 773 F.2d 857, 863 (7th Cir. 1985).

In construing a charge, "the crucial element * * * is the *factual* statement contained therein. Everything else entered on the form is, in essence, a mere amplification of the factual allegations." *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455, 462 (5th Cir. 1970) (emphasis in original). The factual portion of Park's administrative charge described a single personnel decision: the selection of Nicholas, instead of her, to be Assistant Dean for Student Affairs. Even the most charitable reading of Park's narrative cannot transform the charge into a hostile environment claim, nor would the charge reasonably lead the agency to investigate such a claim.

Nothing in the charge even remotely suggests a workplace "permeated with discriminatory intimidation, ridicule, and insult * * * sufficiently severe or pervasive to alter the conditions" of Park's employment. *Harris* v. *Forklift Systems, Inc.*, 510 U.S. 17, 114 S. Ct. 367, 370 (1993) (internal quotation marks omitted). As noted, the charge focuses completely on the selection of Nicholas rather than Park to fill the assistant dean position. While Park now claims that an investigation of that charge would have led the EEOC to discover a variety of allegedly discriminatory acts, the acts of which she now

complains are far removed from the decision she described in her complaint. A reasonable investigation of *that* decision would plainly not have led the EEOC to a wide-ranging probe of the University's more than decade-long relationship with Park. Rather, it would have revealed, as the district court found, that the University selected the most qualified person to serve as assistant dean, and did not discriminate against Park in doing so. That would have ended the matter.

Park's contention (Pet. 12) that the EEOC would have uncovered the unrelated, additional facts that the district court later found to comprise a hostile environment -- facts that included not only different personnel actions widely spaced in time, but also different decisionmakers, and different types of conduct -- is sheer speculation, and was properly rejected on the facts by the court of appeals. Permitting such hindsight to control the scope of the administrative charge would effectively negate the requirement of some relationship between the administrative charge and the allegations made in court and replace it with the assumption that *any* administrative complaint about discrimination is sufficient to exhaust all subsequent charges -- no matter how unrelated to the initial charge. That is not the law.[6]

As the court of appeals observed, Pet. App. A7-A8, in similar cases where an employee's administrative charge challenged only a discrete employment decision, courts have consistently dismissed subsequent lawsuits alleging harassment or a hostile work environment as

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[6] *See, e.g., Cheek* v. *Western & Southern Life Ins. Co.*, 31 F.3d at 501 (Allegations raised in an administrative charge and in litigation must be reasonably related; "This means that the EEOC charge and the complaint must, at minimum, describe the *same conduct* and implicate the *same individuals*") (emphases in original); *Allen* v. *Denver Pub. Sch. Bd.*, 928 F.2d 978, 984 (10th Cir. 1991) (administrative charge alleging 1986 disciplinary action and 1988 discharge did not permit court challenge to 1979 nonpromotion).

beyond the scope of the charge. *See, e.g., Rush*, 966 F.2d at 1110-12 (EEOC charge alleging discriminatory discharge failed to preserve subsequent court claim of racial harassment); *Riley* v. *Technical & Management Servs. Corp.*, 872 F. Supp. 1454, 1459 (D. Md. 1995) (charge alleging discriminatory wages and discharge did not permit later hostile work environment claim), *aff'd*, 79 F.3d 1141 (4th Cir. 1996) (Table); *Berman* v. *Washington Times Corp.*, 129 Lab. Cas. ¶ 57,835 (D.D.C. 1994) (charge alleging sex discrimination based on inadequate work assignments, unfair performance evaluations, suspension, and demeaning treatment in front of complainant's co-workers did not permit later claim of sex harassment). [7]

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[7] *Accord, e.g., Tart* v. *Hill Behan Lumber Co.*, 31 F.3d 668, 672-673 (8th Cir. 1994) (charge alleging discriminatory discharge insufficiently related to subsequent court claim of racial harassment); *Prizevoits* v. *Indiana Bell Tel. Co.*, 882 F. Supp. 787, 791-792 (S.D. Ind. 1995) (charge of discriminatory discharge insufficiently related to subsequent claim of sexual harassment), *appeal dismissed*, 76 F.3d 132 (7th Cir. 1996); *Reese* v. *Goodyear Tire & Rubber Co.*, 859 F. Supp. 1381, 1387 (D. Kan. 1994) (charge alleging discriminatory discharge and retaliation did not permit later claim of racial harassment); *Cabiness* v. *YKK (USA), Inc.*, 859 F. Supp. 582, 586-587 (M.D. Ga. 1994) (charge alleging discriminatory discharge not reasonably related to later claim of hostile environment); *Revis* v. *Slocomb Indus., Inc.*, 814 F. Supp. 1209, 1219 (D. Del. 1993) (charge challenging disciplinary write-ups and suspension did not permit later claim of racially hostile work environment); *Nicol* v. *Imagematrix, Inc.*, 767 F. Supp. 744, 752-755 (E.D. Va. 1991) (charge alleging termination on basis of pregnancy did not permit later hostile work environment claim); *Ghahramani* v. *BASF Corp.*, 755 F. Supp. 708, 710-711 (M.D. La. 1991) (charge alleging discriminatory demotion, several denials of promotion, and discharge did not permit subsequent claim of racial harassment); *Torriero* v. *Olin Corp.*, 684 F. Supp. 1165, 1170 (S.D.N.Y. 1988) (charge alleging discrimination in promotion, transfer, and termination insufficiently related to later claim of sex harassment); *Bartha* v. *Service Sys. Corp.*, 44 Fair Empl. Prac. Cas. (BNA) 1765 (W.D.N.Y. 1987) (charge alleging discriminatory wages and termination did not permit subsequent claim of sex harassment).

Nor did any of the more general statements about discrimination in Park's charge suffice to preserve a hostile environment claim. For all that appears, those statements were simply efforts to characterize the specific incident raised in the charge; they provided no notice that other conduct might be at issue. In *Rush*, relied on by the D.C. Circuit below (Pet. App. A7), the Seventh Circuit held that general claims of discriminatory treatment are insufficient to permit an employee's subsequent court complaint alleging racial harassment:

> [T]he goals behind the requirement of prior resort to administrative relief would be frustrated if the filing of a general charge with the EEOC would open up the possibility of judicial challenges to any related conduct that took place in connection with the employment relationship. * * * Some detail, beyond a statement that "I believe I have been discriminated against because of [a protected characteristic]" is necessary to allow the agency to perform its statutory duty. [966 F.2d at 1110-11.]

See also Baltzer v. *City of Sun Prairie/Police Dep't*, 725 F. Supp. 1008, 1019 (W.D. Wis. 1989); *Pritchett* v. *General Motors Corp.*, 650 F. Supp. 758, 762 (D. Md. 1986).

Particularly when read together with the specific allegations about the assistant dean position, Park's general allegations of discrimination were wholly insufficient to advise the agency and the University that Park might also be making a claim of national origin harassment based on other conduct that occurred over a period of many years.[8] The agency had no opportunity

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[8] Indeed, Park's identification of the date of discrimination in her charge as March 25, 1992 -- the date on which she claims she learned of Nicholas' selection as assistant dean, J.A. 54 -- makes clear that the charge is addressed to that particular decision, and not to events that occurred years earlier.

to investigate the merits of such a claim, and the University had no opportunity to attempt conciliation. Indeed, that the issue of national origin harassment emerged in this case as an afterthought is underscored by Park's initial court pleadings: the original complaint, like the EEOC charge, made no reference to a hostile environment and challenged only the decision regarding the assistant deanship, and the references to harassment and hostile environment in the amended complaint all specify that the alleged conduct was based on Park's *sex*, not her national origin.[9]

For these reasons, the court of appeals' holding that Park failed to exhaust a claim of hostile work environment based on national origin is clearly correct.

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[9] Petitioner apparently does not take issue with the D.C. Circuit's holding that the unsworn "pre-complaint questionnaire" that Park submitted to the D.C. Department of Human Rights over a month before filing her formal charge -- but never served on the University -- cannot be considered part of the formal charge. Pet. App. A8. This holding too is consistent with the decisions of other lower courts. *Hodges* v. *Northwest Airlines, Inc.*, 990 F.2d 1030, 1032 (8th Cir. 1993) (unsworn administrative intake questionnaire "did not constitute a valid charge under Title VII"); *Early* v. *Bankers Life & Cas. Co.*, 959 F.2d 75, 80 (7th Cir. 1992) ("To treat Intake Questionnaires willy-nilly as charges would be to dispense with the requirement of notification of the prospective defendant"); *Clemmer* v. *Enron Corp.*, 882 F. Supp. 606, 610 (S.D. Tex. 1995); *Buffington* v. *General Time Corp.*, 677 F. Supp. 1186, 1193 (M.D. Ga. 1988). Moreover, that Park may have complained to University officials about alleged sex harassment (Pet. 5), of course, did not satisfy her statutory obligation to notify both the University and the EEOC that she might bring a claim of national origin harassment.

CONCLUSION

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,

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